STATE OF MICHIGAN

COURT OF APPEALS

DANFORD ELLSWORTH,

Plaintiff-Appellant,

v

BATTLE CREEK HEALTH CARE SYSTEM,

Defendant-Appellee.

UNPUBLISHED
June 27, 1997

No. 194752
Calhoun Circuit Court
LC No. 95-002420 NH

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant. We affirm.

Plaintiff suffered a stroke following surgery at defendant hospital on August 7, 1992. Initially, plaintiff sued only the doctor who performed the surgery for malpractice. During the deposition of the doctor on March 1, 1995, the doctor revealed that he had ordered an anticoagulant, Heparin, postoperatively and that the Heparin was never administered to plaintiff. The doctor indicated that this could have been the cause of plaintiff's stroke. On August 30, 1995, plaintiff filed a lawsuit against defendant, alleging negligence in failing to administer the Heparin as ordered by the doctor. Although plaintiff's lawsuit was not filed within the two-year period allowed by the malpractice statute of limitations, plaintiff claimed that his lawsuit was timely pursuant to the six-month discovery rule, MCL 600.5838(2); MSA 27A.5838(2), and the fraudulent concealment statute, MCL 600.5855; MSA 27A.5855.

I

Plaintiff first claims that his lawsuit against the hospital is not barred by the statute of limitations because it falls within the tolling provisions of the six-month discovery rule.

While the trial court did not specifically address whether plaintiff's action fell within the tolling provisions of the six-month discovery rule, plaintiff did raise this issue, and the trial court found that the discovery rule did not permit the late filing of plaintiff's claim. Therefore, we address this issue on appeal.

Generally, a person shall not bring or maintain a malpractice action to recover damages for injuries unless the action is commenced within two years after the claim first accrued to the plaintiff. MCL 600.5805(4); MSA 27A.5805(4). Further, a claim based on medical malpractice accrues at the time of the act or omission that is the basis for the claim, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. MCL 600.5838a(1); MSA 27A.5838(1)(1). However, MCL 600.5838a(2); MSA 27A.5838(1)(2) (the discovery rule) provides the following exception to the above rules:

> [A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 or 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . . A medical malpractice action which is not commenced within the time prescribed by this subsection is barred.

In the absence of disputed facts, the question whether a claim is barred by the statute of limitations is a question of law and can be determined by the trial court. *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993); *Shawl v Dhital*, 209 Mich App 321, 325; 529 NW2d 661 (1995). The Supreme Court has adopted the "possible cause of action" standard as the appropriate standard to be applied to the discovery rule. *Moll, supra* at 24; *Shawl, supra* at 324. Under this test, a plaintiff is deemed to be aware of a possible cause of action when he becomes aware of an injury and its possible cause. *Id.* A claimant need not be aware of the details of the evidence that establishes his cause of action. *Shawl, supra* at 326-327. The plaintiff has the burden of establishing that he did not discover or could not have discovered through the exercise of reasonable diligence the existence of a possible medical malpractice claim more than six months before he filed his complaint. MCL 600.5838a(2); MSA 27A.5838(1)(2); *Turner v Mercy Hosps*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

In the present case, plaintiff claims that he could not have been aware of a potential claim against defendant before the doctor's deposition on March 1, 1995, and, therefore, his August 30, 1995, lawsuit against defendant is timely pursuant to the six-month discovery rule. However, as evidenced by the lawsuit filed against the doctor, plaintiff was not ignorant of any wrongdoing arising from his surgery and subsequent stroke at defendant hospital. See *Chase v Sabin*, 445 Mich 190, 200; 516 NW2d 60 (1994). Plaintiff had access to, and in fact reviewed, the medical records regarding his surgery. However, plaintiff did not review his postoperative medical records until after the March 1, 1995, deposition with the doctor. The postoperative medical records made unclear whether in fact the Heparin had been administered.

Given the fact that plaintiff's surgery occurred at defendant hospital and that the medical records of plaintiff's surgery were made available to plaintiff, through reasonable diligence plaintiff should have known of a possible claim against defendant. *Shawl, supra* at 327. Plaintiff did not need to be aware of the particular details of the evidence by which to establish his cause of action to be aware of a possible cause of action. *Id.* Therefore, the statute of limitations barring plaintiff's lawsuit is not tolled pursuant to the six-month discovery rule, and defendant was entitled to judgment as a matter of law.

II

Next, plaintiff claims that his lawsuit against defendant is not barred by the statute of limitations because it falls within the tolling provisions of the fraudulent concealment statute.

As previously noted, a person shall not bring or maintain a malpractice action to recover damages for injuries unless the action is commenced within two years after the claim first accrued to the plaintiff. MCL 600.5805(4); MSA 27A.5805(4). However, MCL 600.5855; MSA 27A.5855 provides the following exception that tolls the above statute of limitations:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

For fraudulent concealment to toll a limitations period, fraud must be manifested by an affirmative act or misrepresentation. *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994). A defendant must have engaged in some arrangement or contrivance of an affirmative character designed to prevent the discovery of a claim. *Id*. In the context of MCL 600.5855; MSA 27A.5855, "Fraudulent concealment means employment of an artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Grebner v Runyon*, 132 Mich App 327, 339; 347 NW2d 741 (1984). Mere silence or inaction is not enough to establish fraudulent concealment tolling the statute of limitations. *Id*. at 340; see also *Bradley v Gleason Works*, 175 Mich App 459, 463; 438 NW2d 330 (1989).

An exception to the rule that fraudulent concealment must be manifested by an affirmative act or misrepresentation exists in those instances in which there is an affirmative duty to disclose by reason of a fiduciary relationship between the parties. *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993); *Lumber Village, Inc v Siegler*, 135 Mich App 685, 694-695; 355 NW2d 654 (1984).

Plaintiff does not claim that defendant acted affirmatively to conceal his possible claim against it, but rather that defendant failed to disclose a material fact that it had a good-faith obligation to disclose. Plaintiff also does not contend that a fiduciary relationship exists between plaintiff and defendant. Plaintiff relies on *Borman's v Lake State Development Co*, 60 Mich App 175, 185-186; 230 NW2d 363 (1975), for the proposition that fraud may be consummated by suppression of, concealment of, or failure to disclose a material fact that a party has a good-faith obligation to disclose. However, this Court's ruling in *Borman's* was specifically limited to parties to a contract. *Id*. Additionally, the plaintiff's fraudulent concealment claim in *Borman* was discussed only briefly by this Court and did not involve the direct application of MCL 600.5855; MSA 27A.5855 or a medical malpractice claim. Therefore, plaintiff's reliance on *Borman* is misplaced.

There is no evidence of, and plaintiff does not allege, an affirmative act or misrepresentation by defendant to prevent him from discovering his claim against defendant. Additionally, this Court has held that a fiduciary relationship does not exist between a patient alleging medical malpractice and a defendant hospital, such that there is a duty to make disclosures, *Carr, supra* at 281, and plaintiff does not allege that such a relationship exists. Therefore, the statute of limitations barring plaintiff's lawsuit against defendant was not tolled by the fraudulent concealment statute.

III

Finally, because the trial court's ruling is affirmed on the basis of the statute of limitations, there is no need to address defendant's judicial estoppel argument.

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs